No. 16-1371

In the Supreme Court of the United States

TERRENCE BYRD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE STATES OF ARIZONA, ARKANSAS, DELAWARE, IDAHO, INDIANA, KENTUCKY, NEBRASKA, NEVADA, NEW JERSEY, OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, TENNESSEE, AND UTAH AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICI STATES 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

I. Byrd Is Wrong That the Majority Rule Gives Police Officers Carte Blanche to Stop and Search All Rental Cars 4

II. The Third Circuit's Experience Shows That Byrd Is Wrong About the Calamitous Effects That Adopting the Majority Rule Would Supposedly Have 8

III. The Majority Rule Is Easier to Administer Than the One Byrd Proposes 15

CONCLUSION 16

TABLE OF AUTHORITIES

CASES

Illinois v. Wardlow,
528 U.S. 119 (2000) 2, 4

Terry v. Ohio,
392 U.S. 1 (1968) 2, 5

United States v. Akinola,
Crim. No. 11-310, 2013 WL 1103702
(D.N.J. Mar. 15, 2013) 13

United States v. Antoine,
Crim. No. 10-229, 2012 WL 3765173
(W.D. Pa. Aug. 30, 2012) 10, 13

United States v. Beck,
140 F.3d 1129 (8th Cir. 1998) 3, 7, 8

United States v. Boruff,
909 F.2d 111 (5th Cir. 1990) 13

United States v. Boyce,
351 F.3d 1102 (11th Cir. 2003) 7, 8

United States v. Butler,
93 F. Supp. 3d (W.D. Pa. 2015) 10, 13

United States v. Coggins,
986 F.2d 651 (3d Cir. 1993) 6

United States v. Coleman,
603 F.3d 496 (8th Cir. 2010) 5, 6

United States v. Contreras,
506 F.3d 1031 (10th Cir. 2007) 5, 6

United States v. Finke,
85 F.3d 1275 (7th Cir. 1996) 5, 6

United States v. Frierson,
611 F. App'x 82 (3d Cir. 2015) 12

United States v. Garcia-Barron,
116 F.3d 1305 (9th Cir. 1997) 1, 5, 6

United States v. Gardenhire,
Crim. No. 15-87, 2017 WL 1022578
(W.D. Pa. Mar. 16, 2017) 11, 13

United States v. Gilliam,
No. 2:12-cr-93, 2016 WL 704702
(W.D. Pa. Feb. 23, 2016) 10

United States v. Goode,
Crim. Nos. 11-204-1, 11-204-2, 11-204-3,
2011 WL 6302553 (E.D. Pa. 2011) 12

United States v. Greene,
No. 15-CR-15, 2017 WL 2180354
(M.D. Pa. May 18, 2017) 12

United States v. Jefferson,
906 F.2d 346 (8th Cir. 1990) 8

United States v. Kennedy,
638 F.3d 159 (3d Cir. 2011) 2, 9, 10

United States v. Kennedy,
Crim. No. 13-240, 2014 WL 6090409
(W.D. Pa. Nov. 13, 2014) 12

United States v. Khanalizadeh,
493 F.3d 479 (5th Cir. 2007) 5

United States v. Korb,
464 F.2d 456 (9th Cir. 1972) 5

United States v. Kye Soo Lee,
898 F.2d 1034 (5th Cir. 1990) 6

United States v. Lyle,
856 F.3d 191 (2d Cir. 2017) 14

United States v. Mebrtatu,
543 F. App'x 137 (3d Cir. 2013) 12

United States v. Muhammad,
58 F.3d 353 (8th Cir. 1995) 14

United States v. Norman,
465 F. App'x 110 (3d Cir. 2012) 10, 11

United States v. Obregon,
748 F.2d 1371 (10th Cir. 1984) 14

United States v. Pruitt,
174 F.3d 1215 (11th Cir. 1999) 7

United States v. Ramdihall,
859 F.3d 80 (1st Cir. 2017) 5

United States v. Roberts,
No. 2:13-CR-0502, 2016 WL 347311
(D.N.J. Jan. 28, 2016) 12

United States v. Sanchez,
943 F.2d 110 (1st Cir. 1991) 14

United States v. Smith,
263 F.3d 571 (6th Cir. 2001) 14

United States v. Thomas,
447 F.3d 1191 (9th Cir. 2006) 14, 15

United States v. Tramunti,
513 F.2d 1087 (2d Cir. 1975) 5

United States v. Wellons,
32 F.3d 117 (4th Cir. 1994) 13

United States v. Williams,
808 F.3d 238 (4th Cir. 2015) 3, 6, 7, 8

United States v. Winters,
782 F.3d 289 (6th Cir. 2015) 1, 5

United States v. Woodley,
Crim. No. 13-113, 2015 WL 5136173
(W.D. Pa. Sept. 1, 2015) 11, 13

Whren v. United States,
517 U.S. 806 (1996) 4

CONSTITUTION

U.S. Const. amend. IV ..... *passim*

INTEREST OF *AMICI* STATES

Amici are the States of Arizona, Arkansas, Delaware, Idaho, Indiana, Kentucky, Nebraska, New Jersey, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, and Utah.[1]

The question presented in this case is whether individuals who are not covered by a rental agreement may nonetheless assert the same expectations of privacy as the person who has actually rented the car. State law-enforcement authorities have an interest in the answer.

Federal appellate courts have "stressed that drug couriers may commonly drive other people's rental cars, [using] so called third-party rentals," as Petitioner Terrence Byrd did here. *United States v. Winters*, 782 F.3d 289, 300 (6th Cir. 2015) (internal quotation marks omitted). Additionally, of particular concern to border States like Arizona, courts also have long acknowledged that human traffickers and alien smugglers often use rental cars to accomplish their crimes. *See, e.g.*, *United States v. Garcia-Barron*, 116 F.3d 1305, 1306–07 (9th Cir. 1997).

Amici States, which include all three States in the Third Circuit, thus have a substantial interest in the Court's disposition of the case.

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[1] *Amici* submit this brief pursuant to Rule 37.4.

SUMMARY OF THE ARGUMENT

The Third Circuit in this case applied the rule that an overwhelming majority of federal courts have endorsed: "the sole occupant of a rental vehicle" who "is not named in the rental agreement . . . has no expectation of privacy and therefore no standing to challenge a search of the vehicle." Pet. App. 8a (citing *United States v. Kennedy*, 638 F.3d 159, 165–67 (3d Cir. 2011) (collecting cases)). Byrd—who was caught transporting 49 bricks of heroin and body armor in a rental car that he was not authorized to drive—urges the Court to adopt a murkier rule that would tie the lawfulness of a search to the "permission" of the actual renter rather than the objective and immediately-discernable rental agreement. Pet. Br. 17. This change is necessary, Byrd argues, because the majority rule "[g]iv[es] police carte blanche" to "stop all rental cars so that they can check whether the driver is on the rental agreement and then proceed to search every inch of the car without any suspicion or justification, if the driver is not listed." *Id.* at 16. He also contends that the existing rule "fail[s] to provide clear and administrable guidance to trained officers in the field." *Id.* Byrd's claims find no support in law or logic.

I. For nearly half a century, this Court has "held that an officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop" only "when the officer has a reasonable, articulable suspicion that criminal activity is afoot." *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000) (citing *Terry v. Ohio*, 392 U.S. 1, 30 (1968)). The mere fact that someone is driving a rental car—even one rented to a third party—is not alone sufficient to supply such

reasonable suspicion. *See, e.g.*, *United States v. Williams*, 808 F.3d 238, 247-53 (4th Cir. 2015) ("accept[ing] that, as a general proposition, some drug traffickers use rental cars" but noting that "Defendants' use of a rental car . . . is of minimal value to the reasonable-suspicion evaluation"); *United States v. Beck*, 140 F.3d 1129, 1137 (8th Cir. 1998) (similar). These courts have not dispatched with the bedrock reasonable suspicion requirement on the bare fact that someone is driving a rental car. Nor could they; this Court has authorized no such exception. Byrd's claim that the majority rule cuts police officers a blank check to stop and search "all rental cars" is misplaced for this reason alone. Pet. Br. 16.

II. Experience also belies the calamity Byrd predicts. Byrd claims "[t]he facts of this case illustrate all too starkly that each of [the] 115 million car rentals" apparently made each year "may be targeted for suspicionless searches if the Third Circuit's rule that unlisted drivers have no Fourth Amendment rights is affirmed." *Id.* at 39. But Byrd's dire predictions are based on his dim view of law enforcement and contradict the experience of jurisdictions that follow the majority rule. Neither Byrd nor any of his *amici* points to a single case in the Third Circuit in the six-plus years since the court adopted that rule in which someone was "targeted for a suspicionless search" simply for driving a rental car.

III. Finally, the majority rule adopted by the Third Circuit (that a driver has no expectation of privacy in a rental car he is not authorized to drive) provides far "clear[er] and [more] administrable guidance to trained officers in the field" than the one Byrd advocates ("that

a person has a reasonable expectation of privacy in a vehicle, if she has possession and control over it with the renter's permission"). Pet. Br. 16, 43. As a matter of common sense, it will be far more "readily apparent to an officer at the scene" whether a driver is listed on a rental agreement than whether the he is driving with the (absent) renter's permission. *Id.* at 43. It is Byrd's rule, not the majority one, that "is impractical to apply." *Id.* at 40.

ARGUMENT

Byrd's Petition obfuscates existing Fourth Amendment protections and elevates speculation over experience. This Court should decline the invitation to add a layer of Fourth Amendment complexity in the form of a factual question over whether the actual renter granted permission.

I. Byrd Is Wrong That the Majority Rule Gives Police Officers Carte Blanche to Stop and Search All Rental Cars

"Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a 'seizure' of 'persons' within the meaning of [the Fourth Amendment]." *Whren v. United States*, 517 U.S. 806, 809–10 (1996). "An automobile stop is thus subject to the constitutional imperative that it not be 'unreasonable' under the circumstances." *Id.* at 810. Such "investigatory stop[s]" therefore must be supported by an officer's "reasonable, articulable suspicion that criminal activity is afoot." *Wardlow*, 528 U.S. at 123.

Courts have "stressed that drug couriers may commonly drive other people's rental cars, [using] so called third-party rentals," as Petitioner Terrence Byrd did here. *Winters*, 782 F.3d at 300 (internal quotation marks omitted); *see also United States v. Contreras*, 506 F.3d 1031, 1036 (10th Cir. 2007) ("credit[ing] the idea that drug couriers often use third-party rental cars"); *United States v. Ramdihall*, 859 F.3d 80, 92 (1st Cir. 2017) (quoting testimony "that when individuals in a rental vehicle are transporting drugs, 'most of the time, the renter of the vehicle is never with the vehicle'").

Indeed, federal courts have widely acknowledged that drug traffickers like Byrd often use car rentals to thwart drug-interdiction efforts, *e.g.*, *United States v. Khanalizadeh*, 493 F.3d 479, 481 (5th Cir. 2007); *United States v. Coleman*, 603 F.3d 496, 500 (8th Cir. 2010), and avoid asset forfeiture, *e.g.*, *United States v. Finke*, 85 F.3d 1275, 1277 (7th Cir. 1996); *United States v. Tramunti*, 513 F.2d 1087, 1102 (2d Cir. 1975). Courts have similarly recognized that human traffickers and alien smugglers often use rental cars. *See, e.g.*, *Garcia-Barron*, 116 F.3d at 1306–07; *United States v. Korb*, 464 F.2d 456, 457 (9th Cir. 1972) ("The officers knew . . . that a rented car is a common modus operandi among marijuana, narcotics, and alien smugglers.").

Because rental cars are often used by drug and human traffickers, the fact that someone is using a rental car may—when combined with other factors—support reasonable suspicion. That application of *Terry* is consistent across the circuits that apply the majority rule. *See, e.g.*, *Contreras*, 506

F.3d at 1035–36 (officer had reasonable suspicion to extend a stop based on "the fact that [defendant] was driving a rental car—which Sergeant Bauer knew to be 'often used by narcotics traffickers . . . [because] it can't be seized,'" among other factors); *United States v. Coggins*, 986 F.2d 651, 655 (3d Cir. 1993) (brief "duration of a car rental" one of five factors constituting reasonable suspicion); *United States v. Kye Soo Lee*, 898 F.2d 1034, 1040 (5th Cir. 1990) ("the fact that the truck had been rented to an unknown third party" one of eight factors contributing to reasonable suspicion for a prolonged stop); *cf. Williams*, 803 F.3d at 247–53 (even in combination with other factors, use of a rental car did not contribute to reasonable suspicion).

The same is true in the circuits that apply the rule Byrd advocates. *See, e.g.*, *Garcia-Barron*, 116 F.3d at 1306–07 (border patrol agent's "experience in stopping rental cars" involved in human smuggling coupled with "the time of day, the route taken . . . the fact that the area was known for alien smuggling" created reasonable suspicion); *United States v. Coleman*, 603 F.3d 496, 500 (8th Cir. 2010) (finding reasonable suspicion where, among other factors, officers saw a car with "an out-of-state license plate [that] can be indicative that the vehicle is a rental").

And it is true in circuits that have not yet chosen sides. *See, e.g.*, *Finke*, 85 F.3d at 1280 ("in light of his experience as a police officer and his knowledge of drug courier activity," officer had reasonable suspicion where "1) the car was a rental; 2) it had been driven to California and back in five days; 3) the passenger compartment appeared as if they had been living in it . . . ; 4) [the driver] was extremely nervous; and

5) [the renter] appeared to be feigning grogginess in an attempt to avoid answering questions").

But the fact that someone is driving a rental car will not necessarily support reasonable suspicion even in combination with other factors. In *Williams*, for example, the Fourth Circuit concluded that the defendants' use of a rental car "on a known drug corridor at 12:37 a.m." and with "state[d] travel plans [that] were inconsistent with, and would likely exceed, the due date for return of the rental car" were insufficient to support reasonable suspicion to detain defendants after completing a traffic stop. *Williams*, 808 F.3d at 247–53. The Fourth Circuit—one of the jurisdictions that applies the majority rule—specifically noted that "Defendants' use of a rental car . . . is of minimal value to the reasonable-suspicion evaluation," even though the court "accept[ed] that, as a general proposition, some drug traffickers use rental cars." *Id.* at 247.

Similarly, in *United States v. Boyce*, 351 F.3d 1102 (11th Cir. 2003), the Eleventh Circuit concluded that an officer lacked "a reasonable and articulable suspicion sufficient to detain [the defendant] beyond [an] initial traffic stop" even though he was "driving a rental car on a known drug corridor" and "planning to return the car two days late." *Id.* at 1108–09. The court noted that "it raises reasonable suspicion that the car is stolen if the rental agreement shows that the person detained is not authorized to drive the vehicle." *Id.* at 1109 (citing *United States v. Pruitt*, 174 F.3d 1215, 1220 (11th Cir. 1999)). Likewise, in *Beck*, the Eighth Circuit "[held] that there was nothing inherently suspicious in [the defendant's] use of a

rental vehicle, even though rented by a third person, to travel." *Beck*, 140 F.3d at 1137. Even combined with six other factors, the court concluded that reasonable suspicion was lacking for detention beyond an admittedly valid stop for following another vehicle too closely. *Id.*

If the combinations of factors in *Williams*, *Boyce*, and *Beck* were not sufficient to create reasonable suspicion for more than a traffic stop, then *a fortiori*, the mere fact that someone is driving a rental car cannot, by itself, support an investigatory stop. *See United States v. Jefferson*, 906 F.2d 346, 348 n.3 (8th Cir. 1990) (facts that defendants "were parked at an interstate rest stop in a rental car from Minnesota . . . are clearly not sufficient to establish a reasonable suspicion of criminal activity").

Byrd ignores this important check on investigatory stops, and he is simply wrong that the majority rule "would encourage the police to pull over every rental car they see" or give police "carte blanche" to "stop all rental cars." Pet. Br. 4, 16. The Fourth Amendment already forbids such suspicionless searches and seizures, regardless of the outcome in this case.

II. The Third Circuit's Experience Shows That Byrd Is Wrong About the Calamitous Effects That Adopting the Majority Rule Would Supposedly Have

Byrd also overstates the "far-reaching effects" the Third Circuit's rule would supposedly have. Pet. Br. 38. He claims that "[i]f unlisted drivers have no Fourth Amendment protection in the car, law enforcement officers would have an incentive to pull over rental cars

whenever the driver commits a technical traffic infraction; check whether the driver is on the rental agreement; and then, if it turns out the driver is unlisted, proceed to search every inch of the car without probable cause to believe that the car contains evidence of a crime." *Id.* Adopting the Third Circuit's rule, Byrd argues, "would skew police incentives toward conducting widespread suspicionless searches of rental cars," "open[ing] the door to suspicionless searches of millions of cars every year." *Id.* at 38, 40.

Byrd never explains why the rule he proposes—*i.e.*, that unauthorized drivers lack an expectation of privacy in a rental car *unless they have the renter's permission*—would create different incentives than the majority rule allegedly does. After all, an officer's chance of getting lucky and stopping someone without a reasonable expectation of privacy still exists. But if Byrd were right about the incentives the Third Circuit's rule creates and how police officers would respond, then surely the effects of those perverse incentives would already be on full display in the Third Circuit. That is especially true if, as Byrd contends, "the police [in the Third Circuit] are well aware of this Fourth Amendment loophole." Pet. Br. 4.

Experience tells a different story. There is no epidemic of police officers in the court below (or elsewhere) preying on rental-car drivers or conducting "the type of exploratory suspicionless searching and dragnet policing" that Byrd predicts. *Id.* To the contrary, in the more than six years since the Third Circuit adopted the majority rule in *United States v. Kennedy*, 638 F.3d 159 (3d Cir. 2011), courts there have heard only about a dozen cases involving unauthorized-

driver rental-car searches, and none of them was a case in which a driver was stopped or searched solely because he or she was driving a rental car.

Several of the cases involved broader criminal investigations. In *United States v. Gilliam*, No. 2:12-cr-93, 2016 WL 704702, at *1–2 (W.D. Pa. Feb. 23, 2016), for example, a police officer stopped a car at the request of DEA agents who had been "intensive[ly] surveill[ing]" defendants as part of a drug-trafficking investigation and observed them, among other things, loading a box into the car that the agents believed contained "drug proceeds." In *United States v. Butler*, 93 F. Supp. 3d 392, 394–96 (W.D. Pa. 2015), officers involved in a DEA task force stopped a vehicle because, based on their surveillance efforts, they believed the defendant "had heroin in his vehicle." And in *Kennedy*, the Third Circuit's leading case, police officers arrested the defendant in connection with a gun- and drug-dealing scheme, and then subsequently searched a rental car that he was seen driving and that was parked outside his house. 638 F.3d at 161.

Two other stops were based on specific information that drivers were involved in criminal activity. In *United States v. Antoine*, Crim. No. 10-229, 2012 WL 3765173, at *1 (W.D. Pa. Aug. 30, 2012), an officer stopped a van as it was leaving a Walmart parking lot after a Walmart employee called the police to report that two men had tried "to purchase gift cards with credit cards that had been rejected," "that the men had just left the store and entered a white Dodge Caravan minivan with a specific Florida license plate number, and that the minivan was leaving the parking lot." And in *United States v. Norman*, 465 F. App'x 110, 115

(3d Cir. 2012) (unpub.), officers stopped a rental vehicle after "notic[ing] that the license plate number of the rental car was listed on the police 'hot sheet'—a digest of vehicles reported as being stolen within the previous five days"—and "confirm[ing] the car's stolen status" by checking the DMV's database.

One stop simply involved highly suspicious circumstances: Based on narcotics "detectives' observations of two individuals sitting in an SUV that was not running, despite freezing temperatures, in a high crime area, the detectives decided to conduct a mere encounter to investigate and determine what the individuals in the SUV were doing." *United States v. Gardenhire*, Crim. No. 15-87, 2017 WL 1022578, at *2-3 (W.D. Pa. Mar. 16, 2017). It turned out that the car was a rental, but that fact played no role in the officers' decision to approach it. Another idiosyncratic case actually involved a safety check. In *United States v. Woodley*, Crim. No. 13-113, 2015 WL 5136173, at *3 (W.D. Pa. Sept. 1, 2015), an officer "observed a vehicle parked on the berm of [a] highway with its hazard signals activated" and "stopped behind the vehicle to check on the safety of the occupant." The driver provided him an alias, an expired rental agreement that did not list him as an authorized driver, and an insurance card for a vehicle belonging to someone else. *Id.* A representative from the rental company subsequently consented to a search of the car. *Id.*

That leaves the cases involving traffic stops. Byrd contends the Third Circuit's rule encourages police officers to stop rental cars for "technical" traffic violations as pretexts for exploratory searches, and notes that officers in this case stopped him for a traffic

violation after identifying the car he was driving as a rental. Pet. Br. 38–39. The *amici* States identified one similar case in the Third Circuit. *See United States v. Frierson*, 611 F. App'x 82, 84–85 (3d Cir. 2015) (unpub.). But in every other unauthorized-driver case in the Third Circuit involving searches of rental cars stopped for traffic violations, the officers apparently learned the cars were rentals *after* they had stopped them.

These cases follow a similar pattern. In one such case, a state trooper stopped a car because "he saw that [it] had an electronic GPS device mounted on the car's windshield," which was a violation of state law, but the trooper only later learned that the car was a rental. *United States v. Goode*, Crim. Nos. 11-204-1, 11-204-2, 11-204-3, 2011 WL 6302553, at *1–2 (E.D. Pa. 2011), *aff'd sub nom United States v. Mebrtatu*, 543 F. App'x 137, 139–40 (3d Cir. 2013). In another, an officer initiated a traffic stop because he "observed a white van allegedly traveling without its headlights or taillights activated." *United States v. Greene*, No. 15-CR-15, 2017 WL 2180354, at *1 (M.D. Pa. May 18, 2017). He learned it was a rental only when he "asked the driver . . . for her driver's license, vehicle registration, and proof of insurance" and she instead handed him "a New York state benefits car and a Hertz rental car agreement." *Id.* *See also United States v. Roberts*, No. 2:13-CR-0502, 2016 WL 347311, at *1 (D.N.J. Jan. 28, 2016) (officer pulled over a vehicle with expired registration stickers and subsequently learned from the driver that it was a rental); *United States v. Kennedy*, Crim. No. 13-240, 2014 WL 6090409, at *2 (W.D. Pa. Nov. 13, 2014) (officer stopped vehicle for speeding and learned it was a rental vehicle only after

pulling it over); *United States v. Akinola*, Crim. No. 11-310, 2013 WL 1103702, at *1–2 (D.N.J. Mar. 15, 2013) (officers stopped a car "after having observed it braking abruptly and swerving between lanes" and therefore believing the driver was "driving under the influence of alcohol"; "[a]t some point after the stop, the officers learned" that the car was a rental and was rented to the driver's girlfriend).

Indeed, even in the cases not involving traffic violations, officers usually learned that cars were rentals only *after* they stopped them. *Gardenhire*, 2017 WL 1022578, at *2–3; *Woodley*, 2015 WL 5136173, at *3; *Butler*, 93 F. Supp. 3d 394–96; *Antoine*, 2012 WL 3765173, at *2.

And none of the other circuits' leading cases suggest that suspicionless stops and searches of rental cars are widespread, regardless of whether the courts apply the majority rule or Byrd's permission-based exception. *See United States v. Wellons*, 32 F.3d 117, 118 (4th Cir. 1994) (state trooper stopped defendant for speeding and only learned it was a rental car when he asked for license and registration); *United States v. Boruff*, 909 F.2d 111, 117 (5th Cir. 1990) (border patrol agent stopped defendant Boruff after the agent (1) "observed Boruff and Taylor traveling at the same speed, in the same two vehicles, at approximately the same distance apart, on two consecutive days on the same stretch of highway near the Mexican border," (2) "knew that Boruff had put something up to his mouth as if it were a microphone when the Border Patrol vehicle passed, that the rental car had a CB radio antenna on the roof," and (3) "[m]ost importantly," "had discovered . . . 591 pounds of marijuana in [Taylor's] pickup truck");

United States v. Obregon, 748 F.2d 1371, 1373 (10th Cir. 1984) (defendant stopped at a roadblock that "had been established to conduct routine driver's license and car registration checks, and to afford training to two members of the New Mexico Mounted Patrol"; officer prolonged the stop "[u]pon determining that Obregon was driving a rented car with expired plates" because he suspected that the car might be stolen); *see also United States v. Sanchez*, 943 F.2d 110, 111–12 (1st Cir. 1991) (defendant was stopped for speeding); *United States v. Lyle*, 856 F.3d 191, 196 (2d Cir. 2017) (officers approached defendant's car based on assorted behavior and only then learned that it was a rental); *United States v. Smith*, 263 F.3d 571, 575 (6th Cir. 2001) (officer followed a vehicle he believed was speeding and then stopped the vehicle after "observing [it] cross onto the shoulder of the road twice within approximately 200 yards").

Cases in the circuits that have adopted Byrd's proposed rule likewise did not involve officers' indiscriminately targeting rental cars. *See United States v. Muhammad*, 58 F.3d 353, 354 (8th Cir. 1995) (officers stopped defendant "in connection with a drug investigation"); *United States v. Thomas*, 447 F.3d 1191, 1994–95 (9th Cir. 2006) (acting on a corroborated tip that defendant had previously rented cars or instructed others to do so in order to transport cocaine, DEA officers tracked and then stopped a rental car rented by one of defendant's known associates).

In short, there is no evidence from the Third Circuit (or anywhere else) that the majority rule—that a driver has no expectation of privacy in a rental car for which he is not covered by the rental agreement—encourages

police to engage in the kind of abuses that Byrd predicts.

III. The Majority Rule Is Easier to Administer Than the One Byrd Proposes

The majority rule is also far easier to administer than the alternative rule Byrd suggests: "that a person has a reasonable expectation of privacy in a vehicle, if she has possession and control over it with the renter's permission." Pet. Br. 43. Byrd contends the majority rule "is impractical to apply," and that "[u]nlike the Third Circuit's authorized-driver test, the considerations relevant to possession and control will tend to be readily apparent to an officer at the scene." *Id.* at 17, 43.

Byrd is wrong as a matter of common sense. Whether someone is listed as an authorized driver generally will be clear on the face of the rental agreement and will not require an officer to parse all of its terms and conditions, as Byrd suggests. Pet. Br. 40–42. Either drivers are listed as authorized drivers or they are not.

In contrast, officers often will be hard pressed to determine during a brief, roadside traffic stop whether a driver actually has the renter's permission to drive a rental car, particularly where (as here) the renter herself is not present. Doing so will require officers either to assess the driver's credibility (Is he telling the truth about having permission? Was the renter's permission conditional on following the law?) or to track down the renter and then assess her credibility (If she says she did not give the renter permission, is she telling the truth?). That process is a recipe for

prolonged stops and equally prolonged litigation. The *Amici* States have seen enough Fourth Amendment litigation to know that Byrd's claim to administrative ease is disingenuous at best.

And, again, experience in the majority of circuits that have decided the issue consistently with the Third Circuit below reveals no practical difficulty with examining a rental agreement.

CONCLUSION

The judgment of the Third Circuit should be affirmed.

Respectfully submitted,

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